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No. 499

IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN, - - - - - - Petitioner,

versus

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of ELIZABETH GRAVES O'BRIEN, Deceased; THE FIDELITY & COLUMBIA TRUST CO. and THE LOUISVILLE TRUST COMPANY, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and EDWARD J. O'BRIEN & CO., a Co-Partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of Elizabeth Graves O'Brien, Deceased, - - - - - - - - - - Respondents.

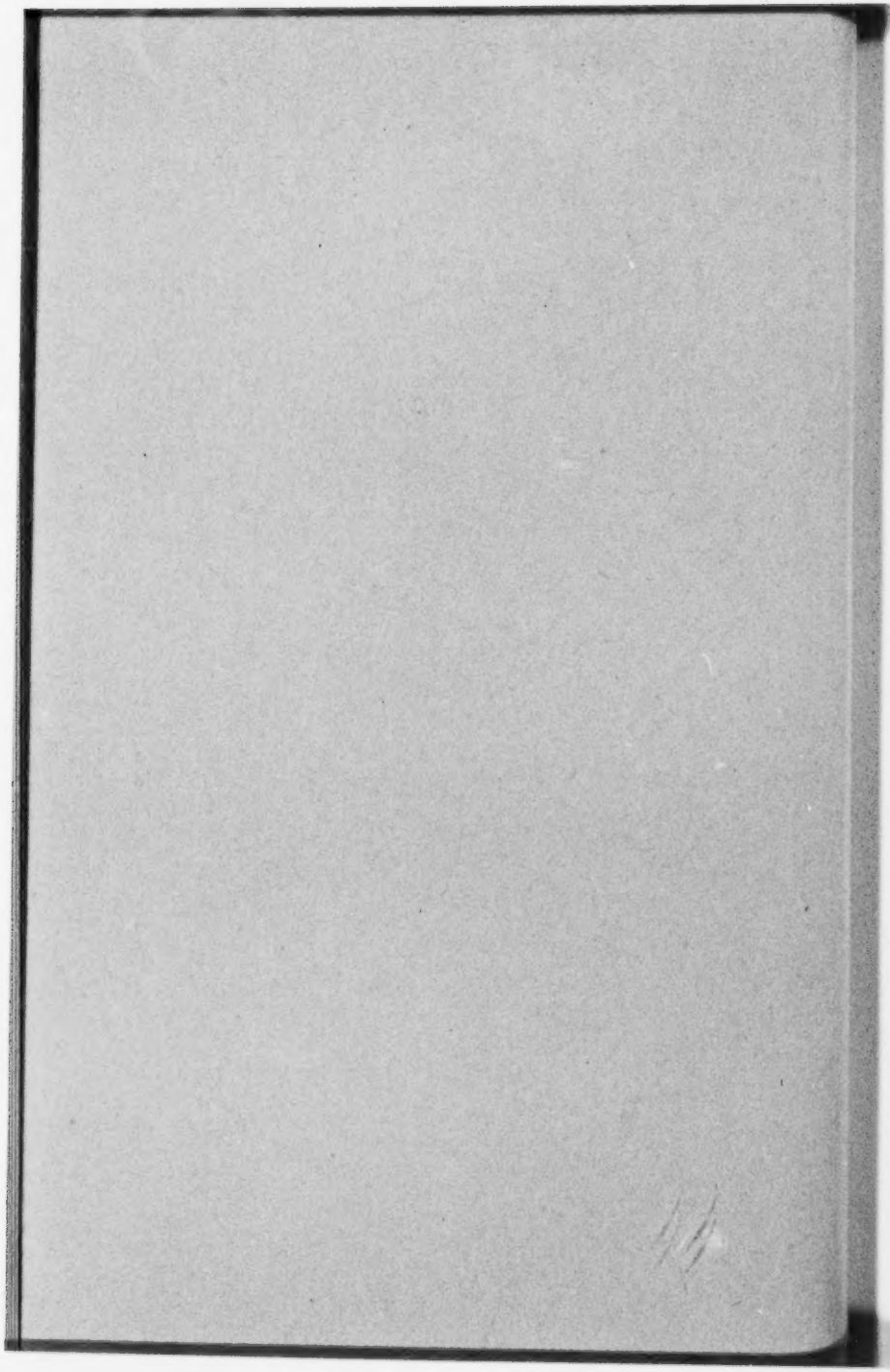
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS SEELBACH,
WILLIAM W. CRAWFORD,
Counsel for Respondents.

CRAWFORD, MIDDLETON, MILNER & SEELBACH,
Of Counsel.

Louisville, Ky.,
January 4, 1944.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondents respectfully submit that the prayer of the Petitioner for the issuance of a writ of certiorari should not be granted.

SUMMARY STATEMENT OF FACTS.

John A. O'Brien, husband of the Petitioner, died on January 1, 1934. At the time of his death he was a partner in the firm of E. J. O'Brien & Co., dealers and brokers in loose-leaf tobacco. The other partners at the time of his death were Edwin J. O'Brien, Jr., Joseph B. O'Brien, James G. O'Brien and Elizabeth Graves O'Brien. The capital investments of the partners varied greatly in accordance with partnership withdrawals and the capital bore no relation whatever to the distribution of partnership earnings, which were according to definite percentages fixed in the Articles of Co-partnership.

After the death of John A. O'Brien, two documents, dated July 7, 1933, and September 22, 1933, respectively, were probated in the Jefferson County Court as his last will and codicil. At the same time the Louisville Trust Company and the Fidelity & Columbia Trust Company, both of Louisville, Kentucky, were appointed co-administrators with the will annexed. The will of July 7, 1933, gave to Petitioner only her dower interest in the estate of John A. O'Brien. The codicil of September 22, 1933, gave to Petitioner his entire personal estate. After John A. O'Brien's death, there also came to light an Insurance Trust Agreement executed by him on July 7, 1933.

The size of the estate to which the Petitioner was entitled depended upon the validity or non-validity of the three documents in question, namely, the will, the codicil, and the Insurance Trust Agreement, and

also upon the value of John A. O'Brien's interest in the partnership of E. J. O'Brien & Co.

The Petitioner retained the services of counsel of outstanding ability and was constantly advised by able representatives of the two trust companies, which had been appointed administrators of the estate. She also retained the services of a well-known firm of accountants.

The death of John A. O'Brien did not dissolve the partnership of E. J. O'Brien & Co., because such a contingency had been specifically taken care of in Article 5 of the Articles of Co-partnership. Under the terms of Article 6 (Transcript of Proceedings, Vol. II, p. 252), it was in substance provided that, in the event of the death of any partner, his interest should remain in the partnership for five years thereafter. It was further stated that:

> "In the event the estate elects to withraw from the partnership at the expiration of five years, then the interest of said decedent shall be the value of the interest, as shown by the books of the company, or by appraisement, plus profits and interest, if any."

About two years after the death of John A. O'Brien, and pursuant to the insistence of Petitioner, and with the approval and consent of her counsel and the administrators, a settlement agreement was entered into under the terms of which the Petitioner received all of the insurance money, which was in controversy (amounting to $201,000), all of the personal estate of

John A. O'Brien outside of the partnership (which amounted to over $60,000), a renunciation of any right to contest the will of John A. O'Brien, and $380,000 in cash for the interest of John A. O'Brien in the partnership of E. J. O'Brien & Co. This agreement was executed by the Petitioner on November 5th and by the Respondents on November 15, 1935.

More than a year later the Petitioner brought this action in the Circuit Court of Jefferson County, Kentucky, to set aside that settlement, claiming fraud through misrepresentation of facts, active concealment of facts, and failure to disclose facts. Inasmuch as the Petitioner received *all* of the insurance existing on the life of John A. O'Brien and *all* of his personal property outside of the partnership, no claim could be made that any facts in connection with such insurance or assets outside of the partnership were misrepresented or concealed or undisclosed. The Petitioner's claim devolved solely into the contention that the value of her husband's interest in the partnership was misrepresented and concealed and undisclosed by the Respondents.

The case was heard orally before the Chancellor of the Jefferson Circuit Court and, after the conclusion of the trial, lasting about four weeks, the Chancellor made his Findings of Fact and Conclusions of Law, which may be found in Transcript of Record, Volume III, beginning at page 340. The judgment of the Jefferson Circuit Court made said "Findings of Fact and Conclusions of Law" a part of the record and ordered that the petition of the plaintiff be dismissed. This

judgment may be found in the Transcript of Record, Volume III, p. 410.

The Petitioner appealed the case to the Court of Appeals of Kentucky. Briefs were filed by both sides, the case was orally argued, and on June 19, 1942, the Court of Appeals of Kentucky affirmed the Judgment of the Jefferson Circuit Court. As to the major portions of the controversy, the affirmance was by a unanimous Court. As to several items, the Court of Appeals of Kentucky divided and the affirmance as to these items was by a divided Court.

The Petitioner filed a Petition for Rehearing in the Court of Appeals of Kentucky and the case was again fully briefed and orally argued, with the result that on March 26, 1943, the Court of Appeals of Kentucky unanimously affirmed the Judgment of the Jefferson Circuit Court dismissing the petition, and modified and extended its former Opinion, dated June 19, 1942.

The Petitioner then filed a Second Petition for Rehearing in the Court of Appeals of Kentucky and in this Second Petition for Rehearing, for the first time, claimed in the very last portion thereof that she had been deprived of her property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Such claim had never been previously raised in the pleadings, on the trial, or in the briefs for Petitioner on appeal, or in the First Petition for Rehearing.

On June 25, 1943, the Court of Appeals of Kentucky overruled Petitioner's Second Petition for Rehearing and further extended its Opinion of June 19,

1942. The full Opinion of the Court of Appeals, as finally issued on June 25, 1943, is reported in 294 Ky. 793, 172 S. W. (2d) 595.

In regard to the alleged Federal question, the Court of Appeals of Kentucky had this to say (294 Ky. at p. 820):

> "On a second petition for rehearing the appellant argues for the first time that she was deprived of due process and equal protection under the law, vouchsafed to all citizens by the Fourteenth Amendment to the Federal Constitution. The same rights are protected by the Bill of Rights of the Constitution of Kentucky. Sections 3 and 14. The claim is rested upon: (1) The ruling of the trial court rejecting as incompetent certain evidence offered by the plaintiff and admitting certain evidence against her as competent; (2) denying her motion for a subpoena *duces tecum* for certain records of the defendants; and (3) the chancellor's 'frequent contemptuous observations as to the plaintiff and her evidence.'
>
> "If the rulings of the court should be regarded as erroneous, such action does not in our opinion offend constitutional rights. Due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against a judicial error in respect to the admission or exclusion of evidence. Arrowsmith v. Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243; *Ex parte* Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. Ed. 796; Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328, 38 S. Ct. 121, 62 L. Ed. 325; *In re* Pusey's Estate, 321 Pa. 248, 184 A. 844, certiorari denied Lavely v. Y. M. C. A., 299 U. S.

572, 57 S. Ct. 36, 81 L. Ed. 422; Stephenson v. Kirtley, 269 U. S. 163, 46 S. Ct. 50, 70 L. Ed. 213.

"This was a long trial, vigorously fought and presenting many complex questions of law and fact. From time to time during her examination the court tried to restrain the garrulity of the plaintiff when testifying. Sometimes the Judge showed impatience. Perfect patience is a virtue seldom possessed, even by a judge. The manifestation of this inherent human quality, however, does not violate any constitutional right of a litigant; especially if there is no jury whose views might be affected by it. The fact that a court severely criticizes the testimony of a witness whom he disbelieved will not support charges that he prejudged the case or showed bias, prejudice or capricious disbelief of evidence in his disposition of the case, nor nullify or otherwise affect his findings on evidence which he believed credible. *In re* Pusey's Estate, *supra*. *Moreover, this court has tried the case de novo and it is not claimed that we have denied the appellant a complete hearing or a fair trial.*

"We are of opinion that the judgment should be affirmed, and it is so ordered.

"Whole Court sitting."

CONTENTIONS OF THE PETITIONER.

The Petitioner claims that she was denied due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that

(1) the lower court overruled petitioner's motion for a subpoena *duces tecum* in all material

respects and denied to her access to any single book of original entry of E. J. O'Brien & Co., or of its subsidiaries;

(2) the Jefferson Circuit Court erred in permitting the introduction in evidence of the Insurance Trust Agreement, dated July 7, 1933, and the will of John A. O'Brien, dated July 7, 1933;

(3) the Kentucky Court erred in recognizing the said Insurance Trust Agreement and Will as a bargaining basis in the sale of the interest of John A. O'Brien's estate to one of the surviving partners;

(4) the decision of the State Court is contrary to the facts and well-established principles of law; and

(5) the Kentucky Court erred in not applying the correct rule of law to the facts found.

ARGUMENT FOR RESPONDENTS.

Respondents submit that there is no Federal question involved in the instant case and that the Supreme Court of the United States is without jurisdiction to grant a Writ of Certiorari.

This Court said in *Corry* v. *Campbell,* 154 U. S. 629:

* * * "We have no power to correct the errors of state courts in respect to the details of assessments made by municipal corporations upon

private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. There can be no doubt but that our jurisdiction is at an end if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice."

In *American Railway Express* v. *Kentucky,* 273 U. S. 269, at page 273, this Court said:

* * * "The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' Pennoyer v. Neff, 95 U. S. 714, 733; Booth v. Illinois, 184 U. S. 425, 429; Truax v. Corrigan, 257 U. S. 312, 329."

We quote the following from the opinion of this Court in *Castillo* v. *McConnico,* 168 U. S. 674, at page 683:

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The

first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the State, and as it is solely the result of such authority, may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several States. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. Pittsburg, Cincinnati &c. Railway v. Backus, 154 U. S. 421; Kentucky Railroad Tax cases, 115 U. S. 321; Davidson v. New Orleans, 96 U. S. 97."

The facts in this case can not now be in dispute. The facts were found by the Chancellor of the Jefferson Circuit Court and affirmed by the decision of the Court of Appeals of Kentucky. Both Courts found that the Respondents did not make any misrepresentation of facts, did not conceal any facts, and did not fail to disclose the facts. Such findings by the Chancellor

and the Court of Appeals of Kentucky, based on substantial testimony, will not be disturbed by the Supreme Court.

In *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, at page 294 this Court said:

> "In this case the master found 'intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence,' and the Supreme Court justified its decision because picketing, 'in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that noncompliance would possibly be followed by acts of an unlawful character.' It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked."

We have hereinabove set forth in numerical order the contentions of Petitioner in that she was denied due process of law by the Kentucky Courts. For convenience, we will discuss these various contentions in the order named:

(1) ALLEGED DENIAL OF PETITIONER'S MOTION FOR SUBPOENA DUCES TECUM.

The petition filed in the Jefferson Circuit Court claimed that the Petitioner was induced to enter into the contract of settlement through misrepresentation of facts, concealment of facts, and failure to disclose facts.

Long before the settlement agreement of November 5-15, 1935, was entered into between the Petitioner and Respondents, it is clear that Petitioner had been furnished the following information:

(a) annual audits of E. J. O'Brien & Co. made by Peat, Marwick, Mitchell & Co. from March 29, 1928, to and including November 30, 1934 (Opinion of the Court of Appeals of Kentucky, 294 Ky. p. 814);

(b) appraisal of plant, property and equipment of E. J. O'Brien & Co. brought down to March, 1935 (Opinion, 294 Ky. p. 813);

(c) annual audits of subsidiaries (Findings of Fact and Conclusions of Law, Transcript of Record, Volume III, p. 399);

(d) copy of Articles of Co-partnership (Transcript of Proceedings, Volume IV, p. 417).

The audits made by Peat, Marwick, Mitchell & Co. and which had been furnished to the Petitioner and which showed *book* values, were used as a basis of negotiations in the settlement agreement. Although

the Petitioner could have had an independent audit made prior to the settlement, she was advised against this by her attorneys because of the expense, and the standing of the auditing firm of Peat, Marwick, Mitchell & Co. (Findings of Fact and Conclusions of Law, Transcript of Record, Volume III, p. 365; Opinion of the Court of Appeals, 294 Ky. p. 809).

In the original petition filed in this action, Petitioner filed as her exhibits "C" and "D" the said Peat, Marwick, Mitchell & Co. audits of the partnership of E. J. O'Brien & Co. for the years 1933 and 1934 (Transcript of Record, Volume I, p. 9).

These audits showed on their face that the values therein contained were *book* values and specifically called attention to the fact that the plant, property and equipment were carried at cost less depreciation; that the tobacco inventory was carried generally on the basis of cost, and that subsidiaries were carried on the basis of cost. The audits further stated that appraisals of plant, property and equipment showed higher values, but that these values had not been set up on the books. We repeat that all of this information was in the hands of the Petitioner before she entered into the settlement agreement of November 5-15, 1935, as was shown by uncontradicted evidence on the trial of the case.

Subsequent to bringing this action, Petitioner on June 24, 1938, asked for a discovery through the production of books and records in the possession of the Respondents. The Petitioner asked to have such books

and records available in an ante-trial deposition in accordance with the provisions of Section 528 of the Civil Code of Practice of Kentucky. This section reads as follows:

> "SUBPOENA DEFINED; SUBPOENA DUCES TECUM; COURT MAY DIRECT ISSUAL OF. The process by which the attendance of a witness is required is a subpoena. It is a writ directed to the sheriff, requiring him to summon the person named therein to attend at a particular time and place, to testify as a witness. It may, *when the court or the judge thereof so directs,* require the witness to bring with him any book, writing or other thing, under his control, which he is bound by law to produce in evidence."

The Court of Appeals of Kentucky has construed Section 528 of the Civil Code of Practice in *Union Trust Co.* v. *Garnett,* 254 Ky. 573, 72 S. W. (2d) 27, as vesting discretionary power in the Chancellor with respect to the production of the documents called for. The language of Section 528 of the Civil Code of Practice of Kentucky itself shows that the power of the Court is a discretionary power and the Court of Appeals of Kentucky in this connection said (254 Ky. p. 577):

> "Not to discern that the language of section 528 vests in the court, or the judge, the right to exercise a sound discretion, when determining the propriety of ordering a subpoena *duces tecum,* is to be forgetful of its language."

The Kentucky procedure is not unique in giving discretion to the Chancellor to require the production of books, papers and records.

Under Rule 58 of the Federal Equity Rules, which were superseded by the New Federal Rules of Civil Procedure, the Court was vested with discretion as to matters of discovery.

Under Rule 34 of the New Federal Rules of Civil Procedure it is stated that

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control;"
> * * *

The foregoing language is not mandatory, but permissive, and places discretion in the Court.

When the Petitioner first applied for discovery on June 24, 1938, the Chancellor ordered the Respondents to produce (Transcript of Record, Volume II, page 182):

(a) all audits of E. J. O'Brien & Co. from the year 1931 to the year 1935, inclusive;

(b) the personal account book of John A. O'Brien with the partnership;

(c) appraisals of the real estate of E. J. O'Brien & Co. for the years 1933, 1934 and 1935;

(d) all audits of all subsidiaries of E. J. O'Brien & Co. for the years 1931 to 1935, inclusive;

(e) appraisals of all subsidiaries of E. J. O'Brien & Co. for the years 1932 to 1935, inclusive.

As to other books and records demanded by the Petitioner, the Chancellor overruled the motion *without prejudice* and filed an opinion in support of his ruling (Transcript of Record, Volume II, p. 185). In this opinion the Chancellor outlined the limits of discovery available to a litigant in the Kentucky Courts and made the following statement:

Transcript of Record, Volume II, p. 187.

"In the instant case the issues are sharply defined. The plaintiff, Mrs. O'Brien, says that she sold out what was her interest in her husband's holding in E. J. O'Brien & Company, for a value less than the actual value, and that she was induced to do so by fraud of the defendant. The discovery sought is purely in respect to the value of the plaintiff's husband's interest in E. J. O'Brien & Company at the time of his death."

Transcript of Record, Volume II, pp. 187-8.

"With the issues defined the court now rules according to the order entered this date. All discovery thereby denied is denied *without prejudice to subsequent application* therefor, should the evidence adduced seem to justify, or should actual testimony be filed by affidavit, deposition, or *viva*

voce showing the relevancy to the issue of the discovery sought and differentiate it from a 'fishing expedition' under the provisions above quoted."

Again, and before the trial of the action, Petitioner moved for a subpoena *duces tecum* and asked for the production of virtually every book, record and document in the possession of the Respondents. On February 29, 1940 (Transcript of Record, Volume III, p. 272) the Chancellor granted the motion as to the following:

(a) Tobacco inventories for 1935, including Federal Government Reports as to amount, grades and year of tobacco in the inventory, and Forms TS-1 of the United States Department of Agriculture for the years 1931 to 1935, inclusive.

(b) Capital drawing and personal accounts of John A. O'Brien for the years 1925 to 1935, inclusive.

(c) Partnership income tax returns and all correspondence with the Commissioner of Internal Revenue relative thereto for the years 1931 to 1935, inclusive.

(d) Insurance premiums paid on any type of insurance by the firm and charged thereto for the years 1931 to 1935, inclusive.

(e) All appraisals for the years 1936, 1937 and 1938.

The order applied not only to the firm of E. J. O'Brien & Co., but to the four subsidiaries, namely, Tobacco Re-handling Company, H. N. Martin Leaf Tobacco Company, Western Tobacco Company and Standard Storage Company.

As to other books and records requested in the motion for subpoena *duces tecum,* the Court overruled the motion *without prejudice* to the right of the plaintiff to renew the application for the same information, or further and additional information.

It will thus be seen that for discovery purposes the Chancellor gave Petitioner access to all the books and records of E. J. O'Brien & Co. and its subsidiaries, which he deemed essential to enable the Petitioner to show whether or not the settlement contract had been entered into through misrepresentation, concealment, or failure to disclose material facts.

The testimony of Petitioner's expert, Hugh A. White (Transcript of Proceedings, Volume XX, p. 930) shows that in the preparation of Petitioner's case for trial he had before him:

(a) all the audits of E. J. O'Brien & Co. and its subsidiaries for the years 1931 to 1935, inclusive;

(b) records of tobacco inventories for 1935, consisting of summary sheets of the quantities and values at the close of the fiscal year and copies of United States Forms TS-1 for the years 1931 to 1935, inclusive;

(c) capital drawing and personal accounts and Federal income tax returns and correspondence for John A. O'Brien and his estate for the years 1925 to 1935, inclusive;

(d) Federal income tax returns and the Revenue Agents' reports relating to E. J. O'Brien & Co. for the years 1931 to 1935, inclusive;

(e) Insurance expense accounts of the partnership for the years 1931 to 1935, inclusive;

(f) appraisals by an appraisal company of the partnership and its subsidiaries for the years 1931 to 1938, inclusive.

During the trial Robert Richardson, connected with Peat, Marwick, Mitchell & Co. and who made the audits, stated that the audits reflected all of the assets as disclosed by the books (Transcript of Proceedings, Volume XVIII, p. 1662); that the audits correctly reflected the information contained in the books (Transcript of Proceedings, Volume XVIII, p. 1711); that the audits used *book* values as disclosed by the books (Transcript of Proceedings, Volume XVIII, p. 1742); and that the books were kept generally on the basis of cost and that the audits explained how the assets were carried (Transcript of Proceedings, Volume XVIII, p. 1760).

At the conclusion of the testimony heard by the Chancellor, the Petitioner renewed her motion for a subpoena *duces tecum* for all the books and records of the partnership and its subsidiaries and the Court

overruled this motion. In connection therewith the Chancellor stated in his Findings of Fact and Conclusions of Law (Transcript of Record, Volume III, p. 390):

> "The theory of this court in delineating the bounds of discovery was this: Not only the case, but also the discovery itself was on trial. In other words, if there was any reason as the trial progressed to believe that the audits were incorrect, incomplete or in any way misleading, the court with the flexible equitable procedure at its disposal might be expected to enlarge the scope of the discovery to the utmost limits required by justice.
>
> "During the course of this long trial where I have not only heard but also forced myself to understand every word of the testimony, there has not been the slightest suggestion that the books of E. J. O'Brien & Company did not reflect every transaction of the business of E. J. O'Brien & Company exactly as it occurred. Understand me, I do not mean for a moment to say that there is no dispute as to the correctness of the interpretations by the auditor of the transactions recorded—the effect given the transactions—but the record of the transactions themselves has thoroughly demonstrated its completeness from first to last throughout this long inquiry."
>
> * * * "I hope I have made it plain; for the matter is important. All transactions are listed, the books are complete. Nothing was acquired without a record of its acquisition, nothing was received without an entry, nor parted with. The audits have stood this acid test."

The negotiations for settlement between Petitioner and Respondents, including the sale of John A. O'Brien's interest in the partnership, were all conducted on the basis of the *book values* of E. J. O'Brien & Co., as shown by annual audits, which had been made by Peat, Marwick, Mitchell & Co., an auditing firm with an international reputation. In this connection the Court of Appeals of Kentucky said:

294 Ky., p. 809.

* * * "All parties concede the reputableness of the auditing firm employed by the company, whose reports were delivered to the representatives of the estate and Mrs. O'Brien. It has not been shown they were wrong and we do not conceive it to have been the duty of the surviving partners to have had another audit made."

294 Ky., p. 812.

"The articles provided that the basis of sale of a deceased partner's interest at the expiration of five years should be 'the value of the interest as shown by the books of the company or by appraisement, plus profits and interest, if any.' This definite contract between all the partners as to the alternative bases of purchase and sale cannot be ignored. It would seem to distinguish the case from the cases wherein the basis of negotiations was not defined. In such instances the true value of the firm's assets ordinarily is the basis rather than the book value. 47 C. J. 1167. The negotiations, as we have said, were predicated upon the book values, excepting the contentions of depressed values because of factors largely outside the business. And this, by the way, was a matter of opinion based upon disclosed facts."

294 Ky., p. 813.

* * * "all parties seem to have been content to settle upon the basis of the book value, subject to the reconciliation of opinions concerning the same and to the give-and-take bargaining in relation to the outside proposition, for we do not find that the matter of valuation by appraisement was mentioned."

The foregoing references to the record and the opinion of the Court of Appeals of Kentucky conclusively show that discovery is afforded by the Kentucky procedure and that the extent thereof is vested in the sound discretion of the Chancellor. Ample discovery was given to Petitioner in the case at bar. It is clear from the Findings of Fact and Conclusions of Law of the Chancellor and the Opinion of the Court of Appeals of Kentucky that the contract of settlement, involving the purchase and sale of an interest in the partnership, was predicated entirely upon *book* values. These values were all correctly reflected in the audits for seven years prior to the sale, which had been furnished to Petitioner and her counsel.

Actual values are, after all, only matters of opinion and were not involved in this litigation, inasmuch as the parties elected to deal on the basis of *book* values, and no statements relative to actual values were ever put forth by the Respondents.

We submit that criticism of the manner in which the Chancellor exercised his discretion on discovery proceedings does not raise any Federal question and the Petitioner was not denied due process of law.

(2) ALLEGED ERROR IN THE INTRODUCTION OF EVIDENCE.

It is claimed by the Petitioner that the Kentucky courts erred in permitting the introduction in evidence of a document dated July 7, 1933, and probated as the will of John A. O'Brien, and also erred in permitting the introduction in evidence of another paper dated July 7, 1933, referred to in the proceedings as the "Insurance Trust Agreement." Petitioner contends that such rulings of the Kentucky courts denied her due process of law.

The Court of Appeals of Kentucky in its opinion in this action (294 Ky. p. 820) correctly stated that due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against a judicial error in respect to the admission or exclusion of evidence, and cited numerous authorities from this Court in support of such statement.

Furthermore, present counsel for the Petitioner have failed to observe that the two documents of July 7, 1933, were introduced in evidence by Petitioner herself. The will dated July 7, 1933, was introduced by Petitioner as her Exhibit "17" (Transcript of Proceedings, Volume II, p. 171) and the Insurance Trust Agreement, dated July 7, 1933, was introduced in evidence by the Petitioner as her Exhibit "13" (Transcript of Proceedings, Volume II, p. 152).

(3) GENERAL CLAIMS THAT THE DECISION OF THE KENTUCKY COURT OF APPEALS WAS ERRONEOUS.

Surely these claims of the Petitioner do not involve any Federal question. They are the claims listed as 3, 4 and 5 in her Petition for writ of certiorari at page 19 thereof under the heading "Questions Presented." In claim 3 the Petitioner charges that the will of July 7, 1933, and the Insurance Trust Agreement of July 7, 1933, were obtained by force and should not have been considered by the Kentucky courts as a bargaining basis for the contract of settlement. Petitioner ignores the Chancellor's Finding of Fact (Transcript of Record, Volume III, p. 351) that John A. O'Brien went to the Louisville Trust Company unaccompanied on July 7, 1933, presented the signed Insurance Trust Agreement to George Caldwell, Vice-president of the Louisville Trust Company, had Caldwell execute the same on behalf of the Trust Company and placed it in a safety deposit box. The Chancellor found that John A. O'Brien was fully competent to transact business on July 7, 1933, and that there was grave doubt as to his mental capacity during the latter part of 1933 and at the time when the so-called codicil of September 22, 1933, was executed by him.

The gravamen of Petitioner's complaint in Nos. 4 and 5 of her "Questions Presented" seems to be that, although the Kentucky Court correctly found the facts and correctly stated the law, it failed to apply the law to the facts found and that this constituted a denial of due process.

A reading of the opinion of the Court of Appeals shows the error of this contention. The Kentucky Court held that, as a matter of law, the Respondents were obligated to make full disclosure to Petitioner of facts within their knowledge bearing upon the business of the partnership of E. J. O'Brien & Co. and its subsidiaries.

The Kentucky Court further found, as a matter of fact, that the Respondents had not misrepresented anything to the Petitioner and had made full disclosure of all material facts within their knowledge. The Chancellor said (Findings of Fact and Conclusions of Law, Transcript of Record, Volume III, p. 371):

> "We already know how much information the defendants O'Briens had furnished Patricia—all they themselves had."

The Court of Appeals in its final opinion, after stating the law to the effect that the Respondents owed a full duty of disclosure to the Petitioner, took up the items of Petitioner's claim *seriatim* and found that all available information had been given to the Petitioner on each of these items before the parties entered into the contract of settlement dated November 5-15, 1935. The Court of Appeals concluded that (294 Ky. 820):

> "Taking into consideration all these factors, as well as the formidable ones mentioned in the beginning concerning the attitude of those with whom the plaintiff had dealt, we are of the opinion that there was a fair and reasonable settlement and contract of purchase and sale."

The answer to Petitioner's contention that the Court of Appeals failed to apply the law to the facts is two-fold. In the first place, such error, if it existed, would not constitute a Federal question, and in the second place the Court did not err, but correctly applied the law to the facts found by the Chancellor and reaffirmed by the Court of Appeals.

CONCLUSION.

This Court has held that a writ of certiorari will not be allowed simply to give a defeated party another hearing (*Magnum Import Company* v. *Coty*, 262 U. S. 159). The Petitioner had a full and complete hearing in the Circuit Court of Jefferson County, Kentucky, and in the Court of Appeals of Kentucky and due process of law was afforded to her. The facts were found against her and the Kentucky courts correctly applied the proper rules of law to the facts found and entered judgment in favor of Respondents. There is no Federal question involved, and we ask that the Petition for a writ of certiorari herein be denied.

Respectfully submitted,

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Louisville, Ky.,
January 4, 1944.

(3)

No. 499.

Office - Supreme Court, U. S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN, - - - Petitioner,

versus

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN and RICHARD J. WHELAN, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased; THE FIDELITY & COLUMBIA TRUST CO. and the LOUISVILLE TRUST COMPANY, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and EDWARD J. O'BRIEN & CO., a Co-partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased, - Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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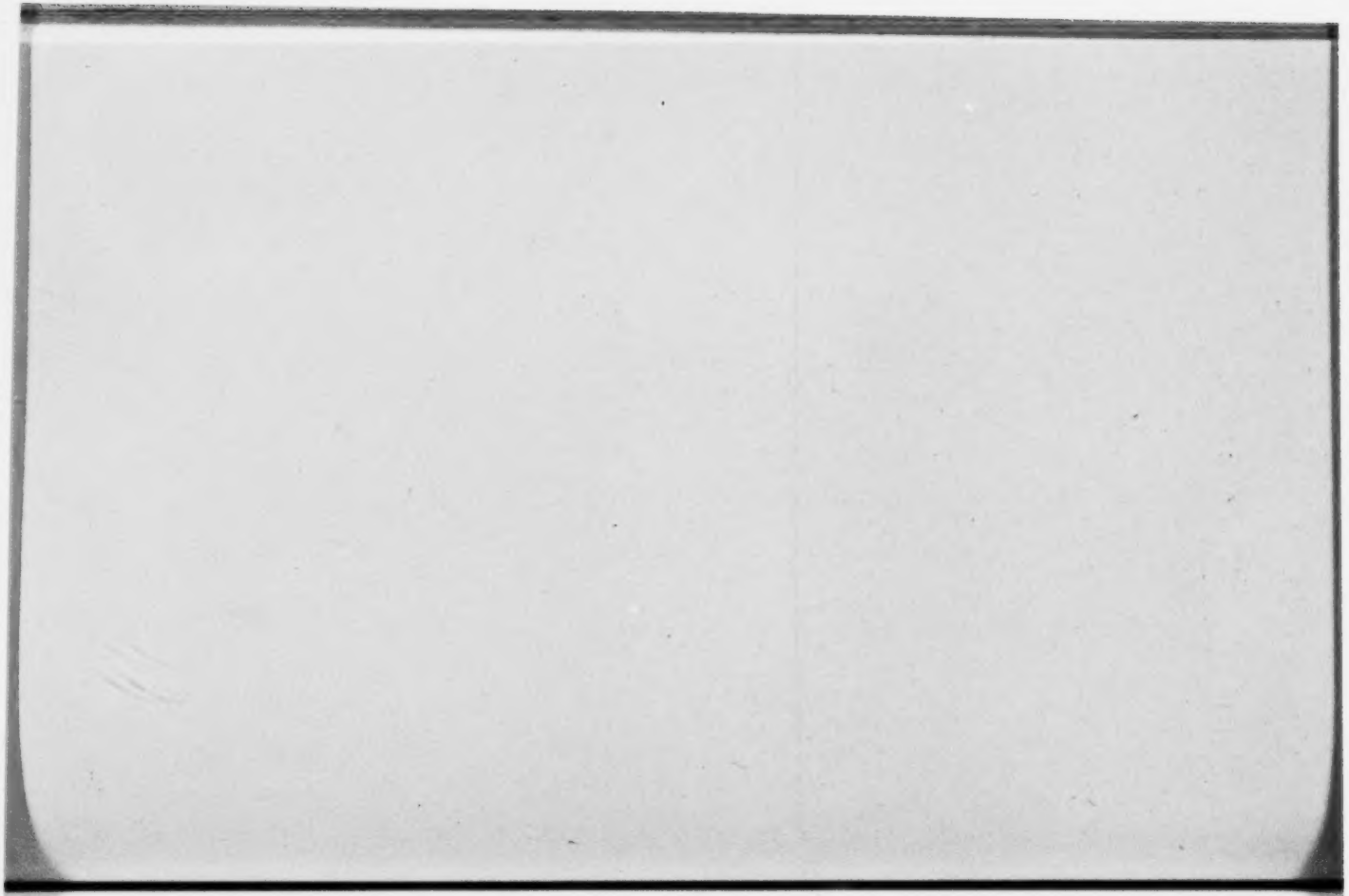

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IN THE

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No. 499.

PATRICIA R. O'BRIEN, - - - - - - *Petitioner,*

v.

EDWIN J. O'BRIEN, ET AL., - - - *Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

OPINIONS BELOW.

The supporting brief which has already been filed sets out in detail the factual background in regard to most of the facts, as well as the law involved in this case. The supporting brief, in setting out quotations from the opinion of the Court of Appeals, refers to pages of the typewritten copy of that opinion as delivered by the Court of Appeals. For the convenience of the Court, this opinion can be found in 172 S. W. (2d) 595 to 609, inclusive.

SUMMARY STATEMENT OF FACTS.

Never in the history of Kentucky's jurisprudence has there ever been an effort made by certain members of a family to deprive the widow of her husband's property plainer than that evidenced by the record in this case. The relationship which existed between the petitioner and her husband, John A. O'Brien, was a happy one which continued from their marriage in 1925 until his death on January 1, 1934. The relationship between petitioner's husband and his brothers was one of estrangement and hostility, to such an extent that they were not on speaking terms.

It is apparent from the record that when John A. O'Brien became ill, his brothers immediately became interested in what disposition would be made of his property. John A. O'Brien was in a comfortable home, properly cared for by his wife, the petitioner, and while in that home, during the absence of his wife, he disappeared. As to how or under what circumstances he left this home, we have but to surmise. There was nothing that indicated any desire on his part to leave. Therefore, the only deduction to be made is that he was taken away. When the wife returned after an absence of thirty minutes her husband was gone. She immediately began an intensive search but was unable to locate him. She got in touch with an attorney, and they went to the office of James and Edwin J. O'Brien, Jr., and were informed that they knew where he was, but refused to tell his wife, the petitioner. John A.

O'Brien was later found in the home of a brother to whom he had not spoken since 1928. Petitioner and her friends were informed that he was in such a condition that he was too ill to see anyone. Not even his own wife was permitted to enter the house. Armed guards were placed around the property to prevent her and his friends from seeing him.

While at the home of Joseph B. O'Brien, the will of July 7, 1933, was made, taking from his wife all the property except that allowed her under the statutes of descent and distribution. On July 7, 1933, an insurance trust agreement was made which provided that in the event there were no children, then $201,000.00 worth of insurance was to go to the O'Brien brothers.

The happenings at the home of Joseph B. O'Brien and the result of their actions are sufficient to cause any reasonable mind to conclude that there was a conspiracy to get the property of John A. O'Brien for the benefit of the other brothers.

As to what occurred at the home of Joseph B. O'Brien, as related to her by her husband, the lips of the petitioner are sealed by Section 606 of the Code of Practice of the Commonwealth of Kentucky.

It was under the circumstances as set out above that the will and trust agreements were executed.

John A. O'Brien was later found in the Seelbach Hotel in Louisville, without a nurse, without a doctor, undernourished, to die a lonely death away from his wife and his home. After he was located in the hotel, the petitioner took him home and tried as best she could to restore him to health. Exhibits No. 29 and

No. 30 are two pictures which show the difference between the appearance of John A. O'Brien before he was taken from his home and the appearance after his return. After he returned to his home, a new will was prepared. The trust agreement was revoked. For a time after his return his strength returned, and for a while it looked as though he would be restored to health. But on January 1, 1934, he died. On the night of his death his brothers met with their lawyers to discuss the future articles of partnership of the Edward J. O'Brien & Company. The O'Briens and their lawyers were then unaware of the execution of the will of September 22, 1933, and probably were unaware of the execution of the papers which revoked the insurance trust. Because on the day that the petitioner offered the will of September 22, 1933, the Judge of the County Court informed them that the O'Brien brothers' attorney had stated to him that he wanted to be called if a will was offered for probate. The attorney was called and came to the court house and stated that there was a will of a later date. When the trust agreement was found this attorney seemed surprised and astounded when he was informed that the insurance trust had been revoked. The attorney at the time stated that "suit will be filed to contest the revocation."

Prior to the death of John A. O'Brien, after his death, and up to the consummation of the agreement to purchase petitioner's interest in the Edward J. O'Brien & Company, the conspiracy continued to get the interest of John A. O'Brien in the company, to get

his insurance, and to deprive the petitioner, the widow of John A. O'Brien, of her rights.

The Probate Court probated both wills. The second will was probated as a codicil to the first will. In January, 1934 the attorney for the O'Brien brothers told the Vice President of the Louisville Trust Company to demand of the insurance companies that they not pay to the petitioner under the policies. The petitioner prepared the necessary proof of loss for the collection of the proceeds of the insurance policies, and employed counsel to represent her. The attorney for the O'Brien brothers insisted that they would claim under the insurance trust and prevent its payment until petitioner sold her interest in the Edward J. O'Brien & Company.

In further pursuance to this conspiracy, the petitioner was informed that unless she submitted to their wishes to sell her interest in the Edward J. O'Brien & Company, they would incorporate the business and freeze out her interest and she would receive less than one hundred thousand dollars. Not satisfied, and being unable to accomplish their purpose, then as an additional threat petitioner was informed that there was a suit pending against the directors of the National Bank of Kentucky, and that Edwin J. O'Brien, Jr., was one of them, and that if a judgment was rendered against the directors, including Edwin J. O'Brien, Jr., in such litigation, that her husband's interest would have to bear such proportionate part of such liability as Edwin's would have to bear. These threats and consistent repetition thereof could have